No. 11,869

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM H. NOVICK and ANNETTA NOVICK,

Appellants,

vs.

ANSON E. GOULDSBERRY,

Appellee.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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STATEMENT OF BASIS FOR JURISDICTION.

The judgment which is the basis of this appeal was rendered June 30, 1947, by the District Court for the Territory of Alaska, Third Division, in favor of the plaintiff, appellee herein, and against four defendants jointly and severally (Tr. pp. 18-19). Two of the defendants are the appellants herein. The other defendants have not joined in the appeal. The judgment is in the sum of two thousand five hundred dollars for compensatory damages plus one thousand dollars punitive damages and for plaintiff's costs and disbursements (Tr. p. 19). The action upon which the judgment was based concerned an alleged assault

upon appellee occurring on July 5, 1946, at Seward, Third Division, Territory of Alaska (Tr. pp. 2-7). On July 5, 1946, and thereafter to and including the filing of the action, and to the time of trial, all of the parties to the action, were residents of Seward, Alaska (Tr. pp. 31, 65, 66, 69, 70, 77, 79).

The District Court for the Territory of Alaska is a Court of general jurisdiction. Act of June 6, 1900, 31 Stat. L. 321, as amended 35 Stat. L. 839, 840, C.L.A. 1933, Sec. 1091, which reads in so far as here material,

> "There is established a District Court for the Territory of Alaska * * * with general jurisdiction in * * * civil causes."

Such District Court had jurisdiction over defendants, including appellants, by reason of personal service of process upon them and by their general appearance in the action first by demurrer, then by answer (Tr. pp. 8, 9-15).

This Court has jurisdiction by virtue of the provisions of Sec. 225, Vol. 28, U.S.C.A. (Judicial Code, Sec. 128) as amended, the pertinent provisions of which are:

> "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions * * * Third. In the District Courts for Alaska, or any division thereof * * * in all cases."

STATEMENT OF THE CASE.

Complaint in the cause from which this appeal arises was filed November 20, 1946, in the District Court for the Territory of Alaska, Third Division (Tr. p. 7). Defendants, including appellants, appeared generally by demurrer and demurrer was overruled (Tr. p. 8). All defendants including appellants, jointly answered the complaint (Tr. pp. 9-15), and all defendants were represented by the same attorney (Tr. p. 14). Plaintiff replied to the answer (Tr. p. 15).

Trial of the cause was commenced March 26, 1947, at Seward, Alaska, before the Honorable Anthony J. Dimond, Judge and a jury duly impanelled and sworn (Tr. p. 31).

Plaintiff was present at the trial in person and by counsel. All defendants likewise were present at the trial and represented by counsel (Tr. p. 31).

At the trial plaintiff and Henry J. Pallage testified on plaintiff's behalf and plaintiff rested his case (Tr. pp. 31-50). Thereupon Joseph M. Hamilton, Patrick J. Friede, Charles Ottoson, Charlie C. Peterson, Peter P. Kerestine, and defendants Annetta Novick, Mrs. Lucille Carroll, and William H. Novick testified on behalf of defendants (Tr. pp. 50-79) and the defense rested (Tr. p. 79).

Defendant William Carroll was personally present in Court (Tr. pp. 31-79) but didn't testify.

Mr. Gouldsberry testified in rebuttal (Tr. pp. 80-81) and then plaintiff's case in chief was reopened

and Irvin L. Metcalf and Dr. J. H. Shelton testified for plaintiff (Tr. pp. 81-84).

Thereupon appellants William H. Novick and Annetta Novick and defendant Lucille Carroll moved for an instructed verdict on the ground of insufficient evidence (Tr. p. 84) and the motion was argued (Tr. pp. 84-88). The motion was by the Court overruled (Tr. p. 88). The defendants then introduced testimony by witnesses Thomas E. Howell, Peter P. Kerestine, William H. Novick and Mrs. Annetta Novick (Tr. pp. 88-96).

After defendants rested their rebuttal Henry J. Pallage testified in rebuttal for the plaintiff (Tr. pp. 96-99) and both sides rested (Tr. p. 99). Both parties introduced evidence in the cause after appellants' motion for directed verdict and had been overruled (Tr. pp. 88-99). Appellants did not renew their motion for directed verdict at the close of all the evidence (Tr. p. 99) or thereafter (Tr. pp. 99-122).

At the close of the evidence the Court instructed the jury (Tr. pp. 99-112). Defendants, including appellants, excepted generally to failure to give their requested instructions but did not specify any grounds of objection nor did any of the defendants state distinctly or otherwise the grounds of their objection to the failure of the Court to give the requested instructions (Tr. pp. 114-115, 118). The defendants excepted to instruction number five as given by the Court on the specific ground that the term "within the scope of employment" was used too frequently

without defining the phrase (Tr. pp. 112-113). Later the Court by instruction 5-C defined "scope of employment" for the jury (Tr. p. 122). None of the defendants excepted to instruction 5-C as given, nor did they in any manner indicate to the Court that such instruction did not meet the objection they had made to instruction 5 (Tr. p. 122).

At the request of the plaintiff the Court added additional language to instruction number 6 (Tr. pp. 119-120). Defendants excepted to the addition made to instruction 6 and limited their exception to such addition (Tr. p. 120). The exception was based on the specific ground that the jury might feel that retention of defendant Carroll in the employment of appellants might constitute ratification of Carroll's acts, and that such retention wouldn't constitute ratification (Tr. pp. 119-120). No objection was made and no exception was taken by any of the defendants to any of the instructions as given by the Court either in whole or in part except as above set forth.

After verdict but before judgment appellants made motion for new trial and the motion was denied. Appellants excluded motion for new trial from the printed transcript (Tr. p. 135).

Assignment of errors made by appellants in this cause are based on several grounds as follows:

1. Overruling of motion for directed verdict made by appellants and defendant Lucille Carroll (Tr. p. 23).

2. Alleged abuse of discretion in overruling motion for new trial (Tr. pp. 23-24).

3. Alleged error in giving a portion of instruction five such portion being set out verbatim (Tr. pp. 24-25).

4. Alleged error in refusing to instruct the jury as requested in defendants' requested instructions one to five inclusive (Tr. pp. 25-29).

In their statement of points on appeal appellants designate additional alleged error in the Court's giving of a portion of instruction 4 (Tr. pp. 131-133) and in giving instruction six (Tr. pp. 133-134).

In their brief appellants designate an additional alleged error in the giving of a portion of instruction number 8 (appellants' brief p. 14) and a portion of instruction number 9 (appellants' brief p. 15). These alleged errors were not raised prior to the brief either by objection, exception, assignment, statement of points or otherwise.

In general appellee concurs in the statement of facts made by appellants with certain exceptions herein set forth.

Appellee does not concur in the statement (appellants' brief pp. 3-4) concerning the movements of Mrs. Novick and what she says she found on arriving in the bar and as to what she did there. Appellee alleges that Mrs. Novick was present in the bar from the beginning of the altercation and that she actively participated in the assault as testified by appellee (Tr. pp. 32, 34, 43, 44, 48, 49).

It is undisputed as alleged in appellants' brief (p. 3) that before July 5, 1946, appellee had "slapped Carroll over", but it is likewise undisputed that at the time of the "slapping over", Carroll was carrying on an improper course of conduct with appellee's wife, in a public place on the streets of Seward, Alaska (Tr. p. 40).

Statement in appellants' brief (p. 4) to the effect that it is undisputed that Mrs. Carroll and Gouldsberry began to quarrel is not accurate. That matter is disputed.

Referring to the last line of the first paragraph on page 4 of appellants' brief, appellee asserts there is nothing in the record to merit the language there used.

Technically appellants are correct in their statement (last paragraph p. 4, brief) to the effect that Gouldsberry's testimony about commencement of the fight conflicts with the testimony of every other witness who testified on the subject. Actually no other witness testified on the subject except Mrs. Carroll.

Charlie Peterson went out and found a policeman as appellants have said. He apparently went as a result of a request by Annetta Novick ("I kept asking people— somebody to please call Pete or Bill, find Bill") (Tr. p. 67).

Appellants' statement that all the witnesses but plaintiff testified plaintiff was trying to get back into the bar when the policeman came is incorrect. Mrs. Novick is the only one who so testified.

Appellee submits there is nothing in the record as to whether appellee appealed or did not appeal as alleged in the last line of page 5 of appellants' brief.

QUESTIONS INVOLVED.

1. Have appellants presented any record in this matter entitling them to relief in this Court?

Raised by the entire record presented including particularly objections made and exceptions taken at the trial, assignment of errors, designation of points and alleged errors raised for the first time in appellants' brief.

2. Assuming that the record presented by appellants is technically sufficient to entitle appellants to relief, have appellants demonstrated substantial prejudicial error in the proceedings before the trial Court so as to require a reversal of the judgment rendered by that Court?

Raised by the entire record on appeal.

ARGUMENT.

Appellants in this matter are not entitled to raise the matters contained in certain of their specifications of error as follows:

1. As to the overruling of Willian Novick's motion for directed verdict for the reason that evidence on behalf of both parties was offered and

admitted after such motion was overruled and such motion was not renewed at the close of the trial or at all after receipt of the additional evidence, and for the further ground that the motion in question had no reference to damages, excessive or otherwise.

2. As to the overruling of Annetta Novick's motion for directed verdict for the same reason as set out in the preceding paragraph.

3. As to denying motion for new trial for the reason that the motion for new trial is not before this Court, the motion having been expressly deleted from the record by direction of appellants, and for the further reason that such motion and the papers in support thereof, are not included in the bill of exceptions.

4. As to the giving of a portion of instruction number 4 as set forth in appellants' specification number four for the reason that no objection was made or exception taken to instruction number four or any part thereof by appellants at the trial. Neither was any assignment of error made concerning the giving of such instruction or any portion thereof.

5. As to the giving of a portion of instruction number 5 as set forth in appellants' specification number five for the reason that no objection was made or exception taken to instruction number five or any part thereof by appellants at the trial,

except that it failed to define "within the scope of employment" and such error if it was error was cured by the giving of instruction 5-C defining "scope of employment" without objection by appellants.

6. As to the giving of instruction number six except as to the language "unless the jury finds by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained", for the reason that the only objection made or exception taken to instruction number six at the trial was specifically limited to the quoted language, and as to the giving of the instruction number six for the reason that no error was alleged in the giving of instruction number six in appellants' assignment of errors.

7, 8, 9, 10, 11. As to refusal of the Court to instruct the jury according to defendants' requested instructions numbered 1 through 5 inclusive for the reason that the exceptions taken to such refusal were merely general exceptions without pointing out reasons or specific objections to such refusal or as to why such requested instructions should have been given, and for the further reason that as will appear from instructions given and the requested instructions the requested instructions were either improper as not being based on any evidence in the case, or were improper as requesting the Court to invade

the province of the jury as to the facts or were given in substance in the charge given the jury by the Court.

12, 13. As to giving that portion of Instruction number 8 and that portion of Instruction number 9 quoted under appellants' specification numbered 12 and 13 for the reason that no objection was made or exception taken to either of such instructions or any part thereof at the trial, and for the further reason that these points have never been raised prior to appellants' brief either by assignment, designation or otherwise.

Appellants by introduction of evidence after denial of their motion for directed verdict waived such motion and the exception taken to its denial and are not entitled to assign such denial as error on this appeal.

Union Pacific Railway Co. v. Daniels, 152 U. S. 684, 687-688;

Runkle v. Burnham, 153 U. S. 216, 222;

Fulkerson et al. v. Chisna Min. & Imp. Co., 122 Fed. 782, 784 (9th Circuit arising from Alaska);

Heskett et al. v. United States, 58 F. (2d) 897, 901-902 (Ninth Circuit).

Appellants are not entitled to assign as error the claimed insufficiency of evidence to justify the verdict having failed to raise that point by appropriate motion at the close of the evidence.

In

Hansen v. Boyd, 161 U.S. 397, 402,

Mr. Justice White says:

"This assignment is of course without merit, since it asks us to determine the weight of proof and thus usurp the province of the jury. There was no motion made at the close of the evidence to direct a verdict, and both parties therefor agreed to the submission of the issues of fact to the consideration of the jury. In the absence of such a request, we must assume that there was sufficient evidence to warrant the Court in permitting the jury to draw the inferences proper to be deduced from the evidence of the case."

Pennsylvania Casualty Company v. Whiteway, et al., 210 Fed. 782, 783-784 (Ninth Circuit).

"When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction and an exception taken to the ruling of the Court."

Bank of Italy v. F. Romero & Co., 287 Fed. 5, 7 (Ninth Circuit Court);

United Verde Copper Co. v. Jaber, 298 F. 97 (Ninth Circuit Court);

Sharples Separator Co. v. Skinner, 251 F. 25, 26-27 (Ninth Circuit).

See also

Frederick v. United States, 163 F. (2d) 536, 539 (Ninth Circuit).

Appellants in their first specification of error (appellants' Brief p. 6) alleges error that the verdict of the jury was for excessive damages. No motion to or ruling of the Court in that connection is before the Court. Neither is the point discussed or argued in appellants' brief. Appellee assumes such specification has been waived and may be disregarded.

Forno v. Coyle, 75 F. (2d) 692, 695 (Ninth Circuit).

The bill of exceptions (Tr. p. 123) shows that defendants filed a motion for new trial, that the motion was denied, and exception allowed. Neither the motion nor the documents in support thereof, nor the order of the Court thereon, are included in the bill of exceptions. Granting or refusal to grant a motion for new trial is in the sound discretion of the Court. Since the grounds of the motion and the reasons for the Court's ruling thereon are not before this Court, it cannot be said as a matter of law that the trial Court manifestly abused its discretion in denying the motion for new trial.

Fairmont Glass Works v. Cub Fork Coal Co., et al., 287 U. S. 474, 482, 485;

Copper River & N. W. Ry. Co. v. Reeder, 211 Fed. 280, 286 (Ninth Circuit arising from Alaska).

If it be argued that the motion for new trial was upon the ground that there was no substantial evidence to justify the verdict against either of the defendants William H. Novick and Annetta Novick as

it is alleged in appellants' third specification of error, appellee contends that upon the record which is before the Court, the motion was properly denied. The motion was made jointly by all the defendants, including William Carroll (Tr. pp. 24 and 123). Appellants concede in their brief (p. 18) that the verdict was proper as against Carroll. Thus a joint motion for new trial by all the defendants was properly denied on that ground alone.

In addition there is not only substantial evidence but ample evidence that appellant Annetta Novick personally took part in the assault on plaintiff. The Court in instructions 3 (Tr. p. 100) defines an assault and in instructions 3-a (Tr. p. 101) instructs that one participating in an assault or an assault and battery is liable as a principal.

The complaint alleges (Par. V Tr. p. 3) that appellant Annetta Novick was present at the time in question. The answer (Par. III Tr. p. 9) denies the presence of appellant Annetta Novick while plaintiff was seated at the bar and alleges that at all times while plaintiff was seated at, or standing near, the bar, Annetta Novick was in an adjacent store, and in Par. V (Tr. p. 12) alleges that "Annetta Novick did not then or any other time so much as touch the plaintiff, but only made every effort to persuade him to cease beating the defendants mercilessly". The evidence is conflicting as to when Annetta Novick arrived at the scene of the conflict, running all the way from her statement that she dashed into the bar when she heard

a racket to see what it was all about (Tr. p. 66) to appellee's testimony that she was there from the beginning and throughout the fray (Tr. pp. 32, 34, 43, 44, 48, 49). The evidence likewise is conflicting as to what part Mrs. Novick took in the matter, but it is undisputed that she helped to drag or push plaintiff to the door when he got off the floor. See appellee's testimony (Tr. p. 34, 43, 44, 48). See also Mrs. Novick's testimony (Tr. p. 66, 67, 69, 95, 96). It is undisputed that she sent for the police (Tr. p. 67) and that when the chief of police came he took no one except appellee, apparently with the full consent of Annetta Novick (Tr. p. 67). This is enough to illustrate that there was ample evidence that Mrs. Novick personally and actively took part in the matter. The jury heard the evidence. The jury had the right and the duty to evaluate the testimony and the credibility of the various witnesses. The jury under the Court's instructions by its verdict could have found and no doubt did find that Annetta Novick was liable for the assault and battery and all its consequences as a principal. The verdict is binding on the appellant Annetta Novick and this Court should not go behind that verdict.

Appellant William Novick was not personally present. Is there any substantial evidence to justify a verdict against him as against the motion for new trial? Appellee submits that there is not only some substantial evidence but ample evidence to support the verdict. The two Novicks were husband and wife

and co-owners and operators of Novick's Cocktail Lounge, apparently as partners. William Carroll was the employee in charge of the business.

The complaint alleges (Par. IV Tr. p. 3) that William Carroll during all times in question "was acting for and on behalf of the defendants William H. Novick and Annetta Novick and acting in the course of his employment as a servant and employee of such defendants", and again (Par. VI Tr. p. 3) that "William Carroll, acting as agent, servant and employee" of appellants "without cause or provocation unlawfully and unjustly assaulted and battered plaintiff", and (Par. VII Tr. p. 4) "William Carroll and Lucille Carroll and Annetta Novick beat plaintiff". Defendants' answer is verified by appellant William Novick. The answer nowhere specifically denies the agency of Carroll or that he was acting in the course of his employment or that he was acting for and on behalf of appellants, except insofar as the allegations of paragraph VI of the complaint are generally denied by paragraph IV of the answer (Tr. p. 10). Nowhere in the answer is any allegation made that Carroll at the time and place in question was not acting in the course of his employment or that he was not acting for and on behalf of appellants. Neither are any facts alleged in the answer from which it could be inferred that Carroll was acting outside the course of his employment. On the contrary it is alleged (Answer Par. IV Tr. p. 10) "that * * * Carroll, in order to protect his wife and himself and *to preserve the peace of the establishment of which he was in charge* (emphasis

supplied) did * * * etc." and again (Answer Par. IV Tr. p. 11) *"and in doing so did not use any more force than was reasonably necessary * * * and to preserve the peace and protect other persons lawfully present"* (emphasis supplied) and (Answer Par. IV, Tr. p. 11) "if plaintiff sustained any injury or damage it was occasioned * * * *while defendant William Carroll was in the quiet and lawful discharge of his duties as bartender in complete charge of the said cocktail lounge".* (emphasis supplied) and (Answer Par. VII Tr. p. 13) *"when plaintiff was arrested for the noise and disturbance that he was creating in said cocktail lounge",* (emphasis supplied) "he was so wild and violent that the arresting officer required considerable assistance in the performance of his duty." and (Answer Par. X Tr. p. 13) "or as a result of his violent behavior after being *forcibly removed* (emphasis supplied) from the cocktail lounge of defendants Novick." * * * Nowhere in his testimony does appellant Novick allege that Carroll was acting outside the scope of his employment and there is nothing in his testimony from which the jury might have inferred Mr. Novick claimed Carroll was acting outside the scope of his employment (Tr. pp. 77-79, 94-95). Neither is there anything in the testimony of Annetta Novick to the effect that Carroll was acting outside the scope of his employment (Tr. pp. 65-69, 95-96).

Defendant William Carroll was present in Court but wasn't called as a witness. Had the Novicks been contending Carroll was not acting for them in the fracas or that he was acting beyond the scope of his

employment or from some personal motive he could have been called to testify as to his duties and the scope of his employment and as to how and why the assault was committed. He was not called.

The Court in instruction number 11 (Tr. p. 109), used the following language: "Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust."

Appellant William Novick, by answer verified by him, alleged facts which the jury properly could have construed as admissions of plaintiff's allegations that William Carroll in starting and in carrying on the assault upon plaintiff was acting for the masters Mr. and Mrs. Novick and in the course of his employment. Had Carroll been acting for himself and not for his masters and outside the scope of his employment evidence of that state of affairs could easily have been given by appellants. No such evidence was offered. It seems inescapable that the jury was entitled to find and did find that appellant William Novick was liable for the assault committed by his servant Carroll.

If Carroll was acting within the scope of his employment ratification of his acts would not be necessary to bind the masters Novicks and the matter of

ratification would become immaterial. Appellee contends the jury could and did find Carroll acted within the scope of his authority. However in addition appellee asserts there is ample evidence from which the jury could find ratification of Carroll's acts by William Novick. It may be, as appellants contend, that taken separately, none of the several acts of appellants after the altercation would constitute ratification, but taken together it seems inescapable that such acts might be evidence of ratification and that is as far as the Court went in its instructions (Inst. 5, Tr. p. 104). Appellants did retain William Carroll in their employment and on the whole record a claim that they did so without full knowledge of the facts seems unwarranted. The jury could properly have found and may have found that Annetta Novick was present throughout the fracas. It doesn't seem likely she didn't make full disclosure to her husband. Appellant Annetta Novick did cause the arrest of plaintiff, first by sending for the police, then by pushing him out the door into the arms of the police if her version is right or by having him arrested in the bar if plaintiff is right. The appellants may or may not have signed a criminal complaint against appellee. The jury properly could have found they did. Whether they did or whether they didn't, they took an active part in the proceedings and were personally present at the kangaroo Court when it is claimed plaintiff was convicted (Tr. pp. 93, 94). Plaintiff testified (Tr. p. 37) "I tried to make a defense at that time and they wouldn't let me talk. Mr. Kerestine, the chief of police, told

me to shut up my face and not beat my gums so much so I wouldn't say nothing. Mr. Novick was there on Monday morning. He didn't have anything to say regarding this case * * *" (Tr. p. 36). "I was being discharged from the hospital. * * * That's the first I knew of it because when the Court was dismissed he didn't tell me I had a $150.00 fine to pay for (or) 75 days in jail. That's the first I knew of it." Of those apparently present at that so-called trial, William Novick, Annetta Novick, Peter Kerestine, and Thomas Howell, all testified in this case for defendants. None of them disputed plaintiff's testimony that he was not allowed to defend himself and that he was not advised of his sentence. Defendants' attorney on the trial of this cause was also present at the police Court trial (Tr. p. 95). He did not dispute plaintiff's testimony as to what happened there. There is no evidence as to whether witnesses were sworn and testified in police Court. There is no evidence that complaining witnesses or Carroll were even ther. Whether appellants signed complaints or not, or if they did sign complaints whether they were used or not, is immaterial. Appellants did take an active part in a so-called judicial proceeding whereby plaintiff was railroaded to jail as a result of a disturbance in appellants' establishment which now appears by the verdict of the jury not to have been his fault.

It is disputed as to just what William Novick told plaintiff at police Court. The jury could properly have found that Mr. Novick intimated that had he

been present at the time of the fracas, that he would have dealt with plaintiff more harshly than Carroll did. Finally, over six months after the assault, Mr. Novick signed and swore to his answer alleging that what Carroll did was done to keep peace in the establishment and to protect other patrons of the bar and inferentially at least Mr. Novick adopted all that Carroll had done as being done in Novick's interest. The conclusion seems inescapable that if ratification is important, the jury could properly have found that William Novick ratified Carroll's acts and adopted them as his own.

Appellants' specification of errors numbers 4, 12, and 13 have to do with alleged errors in the Court's instructions numbered 4, 8 and 9 respectively. As previously shown no objection was made or exception taken to any of these instructions at the trial. (See Tr. pp. 114, 119-122) and this brief under statement of the case, (p. 6). Instructions given may not be reviewed on appeal unless objection is made, the ruling of the Court be had and exception to such instruction is saved at the trial.

Arthur C. Harvey v. Malley, 288 U. S. 415;

Copper River & N. W. Ry. Co., et al. v. Reeder, Ninth Circuit, 211 Fed. 280 and cases therein cited

and the Appellate Court is precluded from considering them under such circumstances.

Beatson Copper Company v. Pedrin, Ninth Circuit 217 Fed. 43 and cases therein cited.

An objection to the instructions of the Court to the jury not raised in the Court below but raised in the Appellate Court for the first time comes too late.

Phoenix Ry. Co. v. Landis, 231 U. S. 578, 582;
Ito v. U. S. (C.C.A. 9) 64 F. (2d) 73, 77;
Western Fire Ins. Co. of Fort Scott, Kan. v. Word, et al., C.C.A. 5, 131 F. (2d) 541, 543.

See also

3 *Am. Jur. Appeal and error Sec.* 378 *and cases* there cited and cases cited in 1947 Pocket Part of the same work same Section number.

In passing, appellee wishes to point out that appellants (brief p. 37) claim instruction four is ambiguous and obscure because it is claimed there is no comma between "in harmony with these instructions" and "such damages". The language objected to is found at lines 16 and 17 of page 102 of the transcript. The comma is plainly evident in the copy of the transcript in the possession of the writer.

But, say appellants, the portion of instruction 8 objected to was plain judicial error and should be noticed despite the fact no objection was taken thereto at the trial. Appellee submits that the language used does not come within the purview of the doctrine of plain judicial error.

See,

Borderland Coal Sales Co. v. Imperial Coal Sales Co. (C.C.A. 6), 7 F. (2d) 116,

where the following language is used:

> "An appellate Court can consider only errors to which objections have been made and exceptions taken in the trial Court. The only exception to this general rule is in criminal cases, where federal Courts of review may sometimes, in the exercise of sound judicial discretion, and to prevent miscarriage of Justice, notice error in the trial to which no exceptions or objections have been taken."

The instant action manifestly is not a criminal case.

In any event the action upon which this appeal is based is neither one for false imprisonment nor for malicious prosecution nor for conspiracy to maliciously prosecute or falsely imprison. The action was one for assault and battery and the tort feasors were liable for all damages proximately resulting from their tortious acts. The arrest and imprisonment were pleaded by plaintiff's complaint (Par. IX Tr. p. 4-5; Par. XII Tr. p. 6; Par. XIII Tr. p. 6) and responsibility therefor was denied by defendants' answer, but any defense in bar because of alleged conviction or a defense of probable cause was not raised until appellants' brief. Neither was any request made to strike the allegations from plaintiff's complaint or to exclude the testimony on that point nor to strike the testimony after it was given. It is now apparent from the record that plaintiff had no trial as our system of justice demands and that his so-called conviction was a farce. It is likewise now apparent from the record before the Court that no probable cause existed and that Annetta Novick knew probable cause did not

exist. If William Novick took the part which he took in this matter without full knowledge he is none the less liable as he should have investigated before proceeding as he did. This arrest and imprisonment arose out of the altercation in the bar and it now appears that the fault there was not appellee's but was defendants'. The court's instruction in this matter clearly said that the jury might consider that evidence if it wished in determining damages. Considering the entire instruction as given, and considering it in its relation to all the other instructions, it is apparent the instruction was proper.

Appellants' specification of error five relates to a portion of instruction five as given. As previously pointed out, appellants objected and excepted at the trial to instruction five on the specific ground that it didn't define "scope of employment" and on that ground only. The Court in response to such objection later gave instruction 5-C which defined scope of employment. No objection or exception was taken to instruction 5-C nor did appellants otherwise indicate to the Court that they were in any way dissatisfied with the action of the Court in that respect. The reason for the rule which precludes examination of matters not objected to in the trial Court is, as the Courts say, "in order to afford that Court a fair opportunity to pass upon the matter, and correct its own errors, if any".

Hazeltine v. Johnson, C.C.A. 9, 92 F. (2d) 866, 868-9 (citing cases).

Appellants in this case made a specific objection to instruction five, the Court corrected its error, if any, the appellants gave no indication that the action taken didn't meet their objection. They are not now entitled to complain.

A careful reading of the language in instruction five now complained of by appellants with the balance of such instruction and a reading of such instruction in connection with all the instructions and the evidence will disclose that such instruction was based on ample evidence and was entirely proper. If appellants wanted other or further instructions on the point in question they could have and should have requested them at the trial. They are too late now to complain.

Specification of error number 6 in appellants' brief has to do with instruction 6 as given by the Court. As shown by the transcript (Tr. p. 120) and appellants' brief (p. 11) appellants did not except to instruction six as a whole but only to certain language added to that instruction as follows:'' * * * unless the jury find by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained.'' The language concerning ratification to which the instruction refers is contained in instruction five and as previously shown in this brief no objection was made or exception taken to that instruction except as to its failure to define ''scope of employment''. That objection was met by the definition of that term later given by the Court.

So far as appellee can determine, appellants' brief does not discuss instruction six except to list the giving of such instruction as a specification of error, (Brief pp. 10-11) and to mention such instruction under "questions involved" (brief pp. 15, 16). In the argument concerning ratification (brief pp. 25-28, 31-36) appellant makes no reference to instruction six but only to instruction five. Appellants' assignment of errors (Tr. pp. 23-28) does not assign as error the giving of instruction number six or any part thereof.

Since no objection was made or exception taken to any part of instruction six except a portion which states in general terms a proposition of law fully developed in instruction five to which no objection was made or exception taken, and since no assignment of error was made as to the giving of instruction six or any part thereof, and since no discussion or argument is had in appellants' brief as to why instruction six as given is not entirely proper, appellee feels that such specification of error can be disregarded. If appellee is wrong in that assumption, then appellee has previously fully argued the matter of ratification. Assuming that the law quoted by appellants concerning ratification is valid law under the facts of those particular cases, it is evident that the facts of this case are entirely different. It is evident here that there was competent evidence from which the jury might properly have found that Mr. Novick ratified Carroll's acts and that is as far as the instructions went. Appellee asserts that instruction six as given when read in the light of the evidence and in connection with the

other instructions, was proper, and that the Court committed no error in giving it. Appellee further asserts that the giving of the part of instruction six objected to by appellants, if it be considered error, was harmless error, in view of the fact that the proposition of ratification was covered in instruction five to which no objection was made or exception taken on that ground at the trial.

Appellants' specification of errors numbered seven through eleven, both numbers inclusive, have to do with the failure of the Court to give appellants' requested instructions numbered one through five, both numbers inclusive. Appellants' brief (pp. 15-17) under "questions involved" urges that certain questions are raised, by failure of the Court to give the requested instructions but no argument is had as to why the requested instructions should have been given or as to how failure to give such requested instructions was error.

Objection made and exception taken at the trial to the failure of the Court to give the requested instructions were in general terms. No attempt to point out specific objections or alleged errors was made. Such objections as were made and exceptions taken were not initiated by appellants. They were only made and taken upon the suggestion of the Court after appellants' attorney had completed his exceptions (Tr. pp. 114-115, 118).

General objections and exceptions made in the trial Court to refusal by the Court to give requested in-

structions do not raise any issue for action by an appellate Court.

See,

Hall v. Aetna Life Ins. Co. (C.C.A. 8), 85 F. (2d) 447, 451, where Sanborn, Circuit Judge said:

"The proper time to take exceptions to the instructions of the Court and to its failure to give requested instructions is at the termination of the charge and before the jury retires, and the exceptions taken should point out wherein the charge is erroneous, or deficient and what requested instructions or portions thereof have not, either in words or in substance, been covered by the charge as given. * * * The test should be whether, as a practical matter, the procedure followed called to the Court's attention the specific omissions in the charge which are assigned as error".

See also:

Pennsylvania R.R. Co. v. Minds, 250 U.S. 368.

In that case error was alleged on refusal of the Court to charge as requested. Mr. Justice Day for the Court said (p. 375):

"This Court has repeatedly held that objections to the charge of a trial Judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis of error proceedings; this is the only course fair to the Court and the parties. * * * Parties may not rest content with the procedure of a trial, saving general

exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial Court had its attention been seasonably called to the matter."

See also:

Chicago, M. & St. P. Ry. Co. v. Harrelson (C.C.A. 8), 14 F. (2d) 893, 896;

Partridge v. Boston & M. R. Co. (C.C.A. 1), 184 F. 211, 215, 216.

In any event the Court committed no error in failing to give the requested instructions.

To have given requested instruction number 1 as requested would have required the Court to instruct as to a defense which was neither raised by the pleadings nor supported by any evidence. As previously shown in this brief the answer did not allege that Carroll acted from any personal animosity and outside the scope of his authority, but on the contrary, it alleged facts from which the jury could have inferred that at the time and place in question, Carroll was protecting the peace and quiet of Novick's Bar, such bar being at the time solely in Carroll's charge, and that he was protecting Novick's property (Answer Par. IV, V, VII, X, Tr. pp. 10-13). No evidence was introduced to show that Carroll was acting in any manner except in performing his duties for appellants. In any event the matter contained in appellants' requested instruction number 1 which was before the Court was given in substance in instructions numbered 5-C and 6.

Appellants' requested instruction number II was not justified either by the pleadings or the evidence and if given would have instructed the jury on issues not before the Court.

That portion of the matter covered in appellants' requested instruction number II which was properly before the Court was given in substance in instructions 5-C and 6.

Appellants' requested instruction number III was not justified by the evidence of the case and the matter contained in such requested instruction was fully covered by instructions 5-C and 6 as given.

The matter contained in appellants' requested instruction number IV was given in substance in the Court's instruction 7.

Appellants' requested instruction number V is substantially the same as appellants' requested instructions I, II, and III, and appellee's comments as to appellants' such requested instructions are equally applicable to requested instruction number V.

Dated, Anchorage, Alaska,
December 10, 1948.

Respectfully submitted,
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